INDEX.

Subject Index.

Opinion below 1
Jurisdiction 1
Question presented 4
Statement of the case 5
1. There is no factual issue involved 5
2. The federal question was properly raised 6
3. The Ohio Supreme Court held the statute valid as applied 9
4. The question is substantial 9
Appendix A—Judgment of the Supreme Court of Ohio 13
Appendix B—Opinion of the Supreme Court of Ohio .. 13
Appendix C—Opinion of the Court of Appeals of Madison County, Ohio 26
Appendix D—Opinion of the Common Pleas Court of Madison County, Ohio 35

Table of Cases Cited.

Charleston Federal Savings and Loan Assn. v. Alderson, 324 U. S., 182 8
Louisville Gas and Electric Company v. Coleman, 277 U. S., 32 ..... 3, 10

Rothwell, et al. v. Linzell, 163 O. S., 517 ..... 1, 9
Royster Guano Co. v. Virginia, 253 U. S., 412 3
Schlesinger v. Wisconsin, 270 U. S., 230 3
State, ex rel. v. Kauer, 156 O. S., 347 9

Statutes Cited.

Constitution of the United States—
14th Amendment 3
General Code of Ohio—
Section 1178-21 ..... 2, 4, 7, 8, 9
Section 7464-1 3
Section 7464-2 3
Section 7464-3 3
Section 7464-4 3
Revised Code of Ohio—
Section 5511.02 ..... 3, 4
United States Code, Title 28—
Section 1257(2) 2, 12

INDEX.

Subject Index.

Opinion below 1
Jurisdiction 1
Question presented 4
Statement of the case 5
1. There is no factual issue involved 5
2. The federal question was properly raised 6
3. The Ohio Supreme Court held the statute valid as applied 9
4. The question is substantial 9
Appendix A—Judgment of the Supreme Court of Ohio 13
Appendix B—Opinion of the Supreme Court of Ohio .. 13
Appendix C—Opinion of the Court of Appeals of Madison County, Ohio 26
Appendix D—Opinion of the Common Pleas Court of Madison County, Ohio 35

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Charleston Federal Savings and Loan Assn. v. Alderson, 324 U. S., 182 8
Louisville Gas and Electric Company v. Coleman, 277 U. S., 32 .....3, 10

Rothwell, et al. v. Linzell, 163 O. S., 517 ..... 1, 9
Royster Guano Co. v. Virginia, 253 U. S., 412 3
Schlesinger v. Wisconsin, 270 U. S., 230 3
State, ex rel. v. Kauer, 156 O. S., 347 9

Statutes Cited.

Constitution of the United States—
14th Amendment 3
General Code of Ohio—
Section 1178-21 ..... 2, 4, 7, 8, 9
Section 7464-1 3
Section 7464-2 3
Section 7464-3 3
Section 7464-4 3
Revised Code of Ohio—
Section 5511.02 ..... 3, 4
United States Code, Title 28—
Section 1257(2) 2, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

J. FRANK ROTHWELL AND DOROTHEA D. ROTHWELL,

Appellants.

vs.

SAMUEL O. LINZELL, DIRECTOR OF HIGHWAYS,

Appellee.

STATEMENT AS TO JURISDICTION.

Appellants J. Frank Rothwell and Dorothea D. Rothwell, submit this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio in the case of *Rothwell, et al., Appellees, v. Linzell, Director of Highways, Appellant,* No. 34267.

OPINION BELOW.

The opinion (including the dissenting opinion of Chief Justice Weygandt) delivered upon the rendering of the

judgment sought to be reviewed is reported officially in Volume 163, Ohio State Reports, beginning at page 517. Opinions were rendered by the Court of Appeals for Madison County, Ohio and the Court of Common Pleas of the county but are not reported. Copies of the judgment in question and all of the opinions are appended to this statement.

JURISDICTION.

1. The judgment reversed the decision of the Court of Appeals for Madison County, Ohio affirming an injunction issued by the county Common Pleas Court to the appellee Director of Highways to desist from interfering with abutting property owners' easements of access to a state highway. The injunction was issued, upon the petition of the appellants, on the grounds that the director had exceeded his powers under section 1178-21, General Code, the statute claimed to authorize his acts; that he had arbitrarily discriminated between owners of property abutting on the highway; and that the statute, if construed to authorize his acts, would be repugnant to the equal protection clauses of the Constitutions of Ohio and of the United States. The Supreme Court of Ohio decided that the director's actions were authorized by the statute and were not violative of the constitutional rights of the property owners.

2. The judgment was made and entered on June 15, 1955 and became final on September 28, 1955 upon denial of an application for rehearing, seasonably filed. Notice of appeal to this court was filed with the clerk of the Supreme Court of Ohio on December 21, 1955.

3. Jurisdiction of the appeal is conferred upon this court by 28 U. S. C., §1257 (2). Appellants challenge the validity of section 1178-21, Ohio General Code, on the

ground that, as construed and applied, it is repugnant to the equal protection clause of the Fourteenth Amendment of the federal Constitution, and the decision of the highest court of the state is in favor of its validity.

4. Cases believed to sustain the jurisdiction of this court on appeal include the following: *Louisville Gas & Electric Co. v. Coleman*, 277 U. S., 32, 48 S. Ct., 423, 72 L. Ed., 770; *Royster Guano Co. v. Virginia*, 253 U. S., 412, 64 L. Ed., 989, 40 S. Ct., 560; *Schlesinger v. Wisconsin*, 270 U. S., 230, 70 L. Ed., 557, 46 S. Ct., 260.

5. The statute involved is Ohio's "limited access highway law." First enacted in 1941 (*"An act to provide the construction procedure of limited access highways or freeways and service highways within the state of Ohio."*, 119 Ohio Laws, 189), it was codified as sections 7464-1, 7464-2, 7464-3 and 7464-4, General Code. It was recodified (as applied to state highways) in 1945 as section 1178-21, General Code, and again in 1954, as section 5511.02, Revised Code. The full text follows:

> "The director of highways may lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate, or abandon 'limited access highways' or 'freeways' in the same manner in which the director may lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate, or abandon highways. The director, board, or municipal authority shall have all additional authority relative to such 'limited access highways' or 'freeways' as he possesses relative to highways, including the authority to acquire by gift, purchase, condemnation, or otherwise land required for right of way.
>
> Where an existing highway, in whole or part, has been designated as, or included within, a 'limited access highway' or 'freeway,' existing easements of access may be extinguished by purchase, gift, agreement, or by condemnation.
>
> As an adjunct of any 'limited access highway' or 'freeway' the director, board, or municipal authority

may lay out and construct highways and drives, to be designated as service highways, to provide access from areas adjacent to a limited access highway or freeway.

A 'limited access highway' or 'freeway' is a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director.

Limitations imposed on the mileage of state highways shall not apply to highways established under this section."

There is no official edition of the Revised Code of Ohio. Section 5511.02, Revised Code (section 1178-21, General Code) appears on page 25 of Title 55, Page's Ohio Revised Code Annotated, and on page 12, Title LV, Chap. 5511, Baldwin's Ohio Revised Code.

QUESTION PRESENTED.

The question is: may the state Director of Highways, conformably with the equal protection clause of the Fourteenth Amendment of the Federal Constitution, pick and choose among the owners of land abutting on a state highway,

(a) condemning the access rights (to the highway) of some abutters and excluding them from access to the highway from their respective lands,

(b) purchasing the access rights of others and excluding some of them, but not all, from access to the highway from their lands,

(c) purchasing from still others their rights of access to the highway from parts of their lands but not from other parts,

(d) allowing some to retain their access rights in full,

(e) permitting some, after the purchase of their access rights, to have direct access to the highway and refusing the privilege to others,

when in all cases,

(a) the abutting property owners are in precisely the same situation, and

(b) no factual basis whatsoever exists for discriminating between them?

STATEMENT OF THE CASE.

1. There Is No Factual Issue Involved.

The facts of the case were stipulated by counsel for the parties. (Record, pages 52-64.) The appellants J. Frank Rothwell and Dorothea D. Rothwell own a parcel of land in Madison County, Ohio abutting on U. S. Route 40, a state highway crossing the county from its east to its west boundary, a distance of 16 miles.

In 1950 the appellee designated 13½ miles of the highway, between the village of West Jefferson (near the east boundary) and the west boundary of the county, a "limited access highway". At the time, the part between West Jefferson and the unincorporated village of Lafayette (about half way to the west boundary) consisted of two two-lane roadways, divided by a narrow median strip, while the part between Lafayette and the west boundary consisted of a single two-lane roadway. The former part had been widened in 1948 by constructing a second two-lane roadway immediately to the north of the existing one, and in 1950 the director had plans for widening the other part in the same manner in 1951.

After declaring the entire 13½ miles a limited access highway, the director commenced to acquire easements for

the projected second roadway from owners of property abutting on the north side of the existing roadway between Lafayette and the west boundary of the county. At the same time he began to acquire their easements of access to the highway. Proceedings were instituted against some of the abutters, including the appellants, to condemn their easements of access. Deeds were obtained from other abutters, conveying all of their access rights to the state. Access rights appurtenant to a part, but not all, of their respective lands were purchased from still other abutters. Another group deeded their access rights to the state but reserved the right to maintain one or more driveways to the highway from their respective lands. Some of the abutters who gave up their access rights, or whose rights were condemned, were permitted by the director to have private drives entering directly upon the highway from their lands, but others, including the appellants, were refused the same treatment. The access rights of owners of property abutting on the south side of the road between Lafayette and the west boundary line, and on both sides of the road from West Jefferson to Lafayette remained undisturbed.

There were no facts stipulated affording a basis for distinguishing any abutting property owner or any parcel of property from any other.

2. The Federal Question Was Properly Raised.

The appellants J. Frank Rothwell and Dorothea D. Rothwell instituted this proceeding in the Common Pleas Court of Madison County on July 11, 1950, acting for themselves and on behalf of the owners of the 200 or more parcels of land abutting on the highway in question. They alleged in their petition that the statute involved did not authorize the director's acts, and that the taking of their access

rights, if allowed, would deprive them of their property without due process of law.

The court decided that the director was not authorized by section 1178-21, General Code, to change a state highway into a limited access highway unless he extinguished all easements of access and allowed access only at designated highway intersections; and, therefore, that the director had exceeded his authority and that his actions were without legal effect. Accordingly, the injunction sought by the property owners was issued.

As to the unequal treatment of the abutters, the court said in its opinion that:

> "It is the opinion of the court that if the statutes may be construed as the director contends the statutes are repugnant to the equal protection clauses of the State and Federal Constitutions.
>
> * * * * * * * * * *
>
> The Constitution, of course, does not prohibit classification, but classification must have some reasonable basis, and here there is no reason for discriminating between abutters on one side of the road and those on the other, or between abutters on the road from Lafayette to the Clark County line and abutters on the section between West Jefferson and Lafayette. Nor is there any basis for distinguishing between the owners of adjoining properties so as to take the access rights of one and to allow the other to retain his. The court is of the opinion it is an arbitrary discrimination between members of the same class which is prohibited by the Bill of Rights." (Appendix D.)

The director appealed to the Court of Appeals for Madison County and said in his assignment of errors that (Record, page 72a):

> "The trial court erred in holding and deciding that the defendant ignored the Bill of Rights and denied the abutting property owners equal protection of the laws as guaranteed by the Federal and State Constitutions."

In briefs filed with the court and in oral argument, counsel for the appellants urged that section 1178-21, General Code, if construed to authorize the director's acts, would be repugnant to the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The Court of Appeals affirmed the trial court and adopted the latter's opinion as its own.

In appealing to the Supreme Court of Ohio, the director specified in his assignment of errors that the Court of Appeals had erred (Record, page 73):

> "4. In holding that the defendant-appellant had ignored the Bill of Rights and denied the abutting property owners equal protection of the laws as guaranteed by the Federal and State Constitutions."

Again, counsel for the appellants, by brief and oral argument, urged the court to consider that the statute in question would not meet the requirement of equal protection under the Federal Constitution if construed to authorize the director's unequal treatment of the abutters.

The federal question was recognized by the court. Writing for the majority, Judge Taft said (163 Ohio St., at page 526):

> "Although Section 1178-21, General Code (R. C. Sec. 5511.02) (see especially second paragraph thereof), apparently authorizes such action by the director, it is contended that, if so construed, that statute is repugnant to the equal protection clauses of the State and Federal Constitutions."

It clearly appears, therefore, that the question of the validity of section 1178-21, General Code, under the Constitution of the United States was properly raised. *Charleston Federal Savings and Loan Assn. v. Alderson*, 324 U. S. 182, 185, 65 S. Ct., 624, 627, 89 L. Ed., 857.

3. The Ohio Supreme Court Held the Statute Valid As Applied.

The court decided that the actions of the highway director were authorized by section 1178-21, General Code, and did not deny the appellants the equal protection of the laws in violation of the Fourteenth Amendment.

The rationale of the decision is that the question of equal protection could arise only as to the property owners whose access rights were condemned (including the appellants), and that they were not denied equal protection because they were entitled to be compensated for the loss of their rights. In this regard it is said in the majority opinion that (163 Ohio St., at page 527):

> "Certainly, therefore, they cannot rely on the ordinary limitations on the exercise of the right of eminent domain."

In other words, in the opinion of the majority of the court, equal protection may be denied at a price. The Chief Justice dissented, saying (163 Ohio St., at page 530):

> "Not only does this discrimination fail to meet the requirement of the statutory definition but it is a clear violation of the equal protection clauses of the Federal and State Constitutions."

4. The Question Is Substantial.

The equal protection question is clearly defined. Before the highway director went into action under section 1178-21, General Code, all abutters had equal rights of access to the highway (*State ex rel. v. Kauer*, 156 Ohio St., 347, 351) and, except under section 1178-21, General Code, it is doubtful that the state could deprive them of the right. *Rothwell v. Linzell*, 163 Ohio St., 517, 525.

The highway director did not claim that there was any reason for the discriminatory treatment of the abutters. His position was simply that he had power under the statute in question, in his sole discretion, to change the highway into a "limited access highway" by administrative fiat and, having done so, (1) to extinguish abutting property owners easements of access by purchase or condemnation, or to refrain from doing so, as he chose; (2) to extinguish some easements of access and not others, (3) to extinguish the right of access from all of a parcel except at one or more points, and (4) to permit or deny access from any parcel after extinguishing the right of access.

This position, approved *in toto* by the Ohio Supreme Court, ignores the general principles of equal protection established by this court. In *Louisville Gas and Electric Company v. Coleman*, 277 U. S., 32, it is said that (37):

> "In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, * * * and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. * * * It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * * That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * Discriminations of an unusual character especially suggest careful considera-

tion to determine whether they are obnoxious to the constitutional provision."

In the instant case it clearly appears that (1) there was a real and substantial discrimination, (2) all the persons affected were in precisely the same situation, and (3) there was no conceivable basis for distinguishing between them. The Supreme Court of Ohio recognized the discrimination and approved it solely on the novel ground that the appellants, although discriminated against, were entitled to compensation for the loss of the access rights taken from them by the exercise of the state's power of eminent domain.

This court has never sanctioned the doctrine that equal protection of the laws may be denied if compensation is paid. The right asserted by the appellants is to equal treatment with all similarly circumstanced. That right has been denied them, arbitrarily, and their right to compensation for the loss of their property does not satisfy the requirements of the Fourteenth Amendment.

The statute challenged relates to thousands of miles of state highways in Ohio. It does not represent an effort on the part of the state to exert its police power, as the Supreme Court of Ohio points out in its opinion (163 Ohio St., at page 528). Its purpose is "to provide the *construction procedure* of limited access highways * * *" (119 O. L., 189), and, as construed by the court, it also provides for the conversion of existing state highways into limited access highways by a wave of the highway director's pen. When that has been done, the director may deal with abutting property owners in the same manner as he did with the appellants and other abutters on U. S. Route 40 in Madison county. Consequently, the statute affects all of the owners of property abutting on Ohio highways.

This appeal, however, is not based upon future denials of equal protection of the laws of Ohio to owners of property abutting on other state highways. The question here is of the validity of the statute as construed by the Supreme Court of Ohio and applied in the case of the appellants J. Frank Rothwell and Dorothea D. Rothwell, and it is a substantial question.

It is respectfully submitted that this court has, and should exercise, jurisdiction of this appeal under 28 USC §1257 (2).

JOHN CAREN,
Counsel for Appellants.

APPENDIX A.

Judgment Entry.

(Dated June 15, 1955.)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Madison county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and final judgment is hereby rendered in favor of appellant herein.

It is further ordered and adjudged that appellant recover from appellees his costs expended in this court, in the Court of Appeals and in the Court of Common Pleas taxed at $.....

Ordered, that a special mandate be sent to the Court of Common Pleas of Madison county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Madison county, "for entry".

APPENDIX B.

Opinion of the Supreme Court of Ohio.

This action was instituted in the Common Pleas Court of Madison County against the Director of Highways of the state of Ohio, herein referred to as the director, to enjoin the director from taking " 'limited access' easement rights from plaintiffs and others similarly situated," as

"abutting property owners on U. S. Route 40 in Madison County," and, if such rights may be taken under Section 1178-21, General Code, then to enjoin the director from taking such rights "without first providing said abutting property owners with reasonable access in the nature of 'service highways' as required by the terms of said statute."

Section 1178-21, General Code (Section 5511.02, Revised Code),* reads, so far as pertinent:

"The *Director* of Highways shall be *authorized to* lay out, *establish,* acquire, open, construct, improve, maintain, regulate, vacate or abandon *'limited access highways'* or 'freeways' within this state *in the manner* or manners *in which* said director *may now* or hereafter lay out, *establish,* acquire, open, construct, improve, maintain, regulate, vacate or abandon *highways* within the state. The director also shall have any and all other additional authority and power relative to such 'limited access highways' or 'freeways' as he now or hereafter may possess relative to highways including the authority and power to acquire by gift, purchase, condemnation or otherwise land required for right of way.

"Where an *existing highway in whole or part* has been *designated as,* or included within, a *'limited access high-*

* This section was enacted in 1945 as part of an act to provide for the recodification and revision of laws pertaining to state highways. (121 Ohio Laws, 455.) Prior thereto, the General Assembly had enacted in 1941 an act to provide "for the construction procedure of limited access highways or free highways and service highways." (119 Ohio Laws, 189.) The provisions of this 1941 act were allocated Sections Nos. 7464-1 to 7464-4, inclusive, General Code (Sections 5535.02 to 5535.05, inclusive, Revised Code.) Those General Code sections were not referred to in the enactment of the foregoing 1945 recodification. Although there are some differences between the words used in Section 1178-21, General Code, and those used in the corresponding portions of Sections 7464-1 to 7464-4, inclusive, General Code, we do not believe that, so far as the latter sections relate to the director, those differences are significant in the instant case. We will, therefore, refer herein only to the provisions of Section 1178-21, General Code, which originated in the 1945 recodification and not to their counterparts which originated in the earlier 1941 act.

way' or 'freeway' *existing easements of access may be extinguished* by purchase, gift, agreement or by condemnation.

"*As* an *adjunct of* any *'limited access highway'* or 'freeway' the *director* is *authorized to lay out and construct highways and drives, to be designated as service highways, to provide access from areas adjacent to* a *limited access highway* or freeway.

"A *'limited access highway'* or 'freeway' *is* a *highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of* the *fact that* their *property abuts upon such highway, and access to which may be allowed only at highway intersections designated by* the *director.*" (Emphasis added.)

The only evidence presented was by way of stipulations between the parties as to certain facts.

U. S. Route 40 runs from Atlantic City, New Jersey, to San Francisco, California. In passing through Ohio, where it is often referred to as "the National Road," it crosses ten counties, a total distance of approximately 227 miles, of which approximately 16 miles are in Madison County.

Route 40 was originally constructed in Ohio by the United States War Department with funds appropriated by Congress; it was completed as far from the east as Springfield by 1837; and control thereof in Ohio was surrendered to Ohio by the United States by sections as it was completed.

In traversing Madison County, Route 40 first passes through West Jefferson, which is about two miles west of the Franklin County line; then through Lafayette, about seven miles beyond West Jefferson; then through Summerford, which is about five miles beyond Lafayette and about two miles east of the Clark County line.

The Madison County portion of Route 40 has now been largely reconstructed as a divided four-lane highway having paved surfaces of an average of 22 feet each for easterly and for westerly double traffic lanes. This reconstruction was done in three general stages, (1) in about 1940, as a part of such reconstruction from the west corporate limits of Columbus in Franklin County to the east corporate limits of West Jefferson, (2) in 1948 and 1949, from the west corporate limits of West Jefferson to the east limits of Lafayette, and (3) in and after 1950, from the west limits of Lafayette, and bypassing its former location through Summerford, to the Clark County line.

In 1950, purporting to act under Section 1178-21, General Code, the director designated the Madison County portion of Route 40 from the west limits of West Jefferson to the Clark County line, a distance of 13.58 miles, as a "limited access" highway.

The judgment of the Common Pleas Court held that, in doing so, the director exceeded his statutory powers, and that judgment enjoined the taking of rights of access from the owners of property abutting upon that portion of Route 40, "without prejudice * * * to the lawful exercise of * * * powers conferred upon the director by Section 1178-21, General Code."

On appeal to the Court of Appeals on questions of law, that judgment was affirmed.

The cause is now before this court on appeal from the judgment of the Court of Appeals.

Mr. John M. Caren, for appellees.

Mr. C. William O'Neill, attorney general, and *Mr. Hugh E. Kirkwood, Jr.*, for appellant.

TAFT, J. By the first paragraph of Section 1178-21, General Code, "the director" is "authorized to * * * establish * * * 'limited access highways' * * * in the manner

* * * in which said director may now * * * establish * * * highways * * *," *i.e.*, as provided in Section 1178-20, General Code. It is apparently conceded that that the director has taken all the formal procedural steps required to establish the foregoing 13.58-mile portion of Route 40 in Madison County as a limited access highway.

It is contended by plaintiffs that the statutes do not authorize the director "to change a short, isolated section of an ordinary state road into a 'limited access highway.'" Although the 13.58-mile section of Route 40 involved in the instant case might be described as a short section of a road, the stipulated facts hereinbefore referred to clearly disclose that there is no justification for a determination that that 13.58-mile section is an "isolated section of an ordinary state road." It is obviously neither "isolated" nor is it a section of "an ordinary state road."

There is nothing in the statutes to indicate that the shortness of this section represents any impediment to its establishment as a limited access highway or a part of such a highway. Although the record discloses that sections of Route 40, totalling over 55 of the 227 miles in Ohio, have already been designated as limited access, plaintiffs contend that the 13.58-mile section involved in the instant case "was not being incorporated into an existing or projected limited access highway but was being constituted a limited access highway, in and of itself," and the director had no authority to do that. This contention is answered by the words of the second paragraph of Section 1178-21, General Code, which clearly contemplate that "an existing highway in whole or part" may be "designated as, or included within, a limited access highway."

Plaintiffs state in their brief that "the crux of this case is the meaning of the words," found in the definition of a "limited access highway" in the fourth paragraph of

Section 1178-21, General Code, which words are, "access to which [a limited access highway] may be allowed only at highway intersections designated by the director." It is the contention of plaintiffs that these words mean that "access [to a limited access highway] is allowable only at highway intersections designated by the director." If this contention were sound, then, where the General Assembly used the words in the second paragraph of Section 1178-21, General Code, "existing easements of access *may* be extinguished," it should have used "must" or "shall" instead of "may." In our opinion, the words in the fourth paragraph of Section 1178-21, General Code, "access to which may be allowed only at highway intersections designated by the director," were merely used by the General Assembly to show the extent to which rights of access to a limited access highway might be curtailed or eliminated.

Plaintiffs also contend that the director had no authority to designate the 13.58-mile section of Route 40 involved in the instant case as a "limited access highway," because it was not "especially designed for through traffic" and consequently could not come within the definition of a "limited access highway" found in the fourth paragraph of Section 1178-21, General Code. It may be observed that, before designating this section of Route 40 as a limited access highway, the director had the duty to determine and presumably did determine that it was "especially designed for through traffic." Even if plaintiffs did not have the burden of proving that this section of Route 40 was not "especially designed for through traffic," considerable weight should be given to this administrative determination by the director. See *State, ex rel., Speeth et al., Commrs.*, v. *Carney, Aud.*, *ante*, 159, 186.

The stipulation, that substantial portions of this section were not "originally 'especially designed' as a limited

access highway," is of no significance with respect to this question, since other stipulations indicate that such original design was at least as remote as the year 1837. The mere fact, that a highway is designed so that it may and will be used by abutters and by local traffic, is not inconsistent with the conclusion that such highway is especially designed for through traffic. It is obviously not necessary that a highway be designed exclusively for through traffic in order to be especially designed for through traffic. This court can and will take judicial notice of the facts, that there is very little four-lane divided highway mileage in Ohio and that such highway mileage, at least where it now exists in rural areas in Ohio, is almost invariably a part of a highway clearly and obviously designed principally and especially for through traffic. In our opinion, the stipulated facts require the conclusion as a matter of law that this 13.58-mile section of Route 40 as now constructed was especially designed for through traffic, within the meaning of those words as used in the fourth paragraph of Section 1178-21, General Code.

As we view it, Section 1178-21, General Code, was enacted to authorize and empower the director to take action that he might otherwise have been unauthorized to take with respect to highways, and to avoid consequences from his taking of action in locating and constructing highways that might otherwise have followed his taking of such action. For example, apart from that statute, an abutting property owner has an easement or right of access over an ordinary highway by reason of the fact that his property abuts upon that highway. *State, ex rel. McKay, Exr.*, v. *Kauer, Dir.*, 156 Ohio St., 347, 102 N. E. (2d), 703. As the second paragraph of Section 1178-21, General Code, indicates, the mere designation of an existing highway as a

limited access highway does not deprive such abutting property owner of the easement or right of access that he theretofore had. However, with respect to a newly located portion of such a limited access highway, the words of the fourth paragraph of Section 1178-21, General Code, certainly operate to prevent the acquisition by an abutting property owner of any easement or right of access to the relocated portion merely by reason of the fact that his property abuts on such relocated portion. Also, without the provisions of the second paragraph of Section 1178-21, General Code, there may well have been doubt as to the authority of the director to extinguish, especially by condemnation, existing easements of access to a highway. See *Pontiac Improvement Co.* v. *Board of Commrs.*, 104 Ohio St., 447, 135 N. E., 635, 23 A. L. R., 866; *Ellis* v. *Ohio Turnpike Commission*, 162 Ohio St., 86, 120 N. E. (2d), 719. As hereinbefore mentioned, the latter portion of the fourth paragraph of Section 1178-21, General Code, shows the extent to which that authority may be exercised. The provisions of the third paragraph of Section 1178-21, General Code, were obviously enacted to remove any question with respect to the authority of the director to alleviate the consequences of his elimination of access to a limited access highway.

The provisions of Section 1178-21, General Code, do not require the director to extinguish all easements of access to a limited access highway, or to construct so-called "service highways" to provide access to a limited access highway, or to prevent access to a limited access highway except at designated highway intersections. Those provisions merely authorize and empower the director with respect to such extinguishment, construction, and prevention of access. The extent to which he shall exercise the

authority and power conferred upon him is left to his discretion. See *State, ex rel. Kauer, Dir.* v. *Defenbacher, Dir.*, 153 Ohio St., 268, 91 N. E. (2d), 512, and *State, ex rel. Allen,* v. *Ferguson, Aud.*, 155 Ohio St., 26, 97 N. E. (2d), 660.

As to that portion of the section of Route 40, that is involved in the instant case and extends to the west of Lafayette, plaintiffs argue that property owners on the north side have been treated unequally in the following respects: (1) from some, the director has acquired or is seeking to condemn all rights of access; (2) from others, the director has acquired access rights, except for a private drive or drives reserved by such others; and (3) from still others, the right of access has been extinguished from only a part of their property and not from other parts.

Plaintiffs also point out that owners of property, abutting on the south side of that portion of the road west of Lafayette and on both sides of the road to the east of Lafayette, still retain all access rights.

Although Section 1178-21, General Code (see especially second paragraph thereof), apparently authorizes such action by the director, it is contended that, if so construed, that statute is repugnant to the equal protection clauses of the state and federal Constitutions. In the state Constitution, Section 2 of Article I provides that "government is instituted for" the "equal protection and benefit" of "the people"; and in the federal Constitution, Section 1 of Article XIV, Amendments, provides that "no state shall * * * deny to any person * * * the equal protection of the laws."

It may be observed that the director may extinguish an existing easement of access to a limited access highway by purchase, gift, agreement or by condemnation (second paragraph of Section 1178-21, General Code). It is obviously only where such extinguishment is by condemna-

tion that any constitutional question can possibly be raised. Where the director does proceed to extinguish such an easement of access by condemnation, he is exercising, on behalf of the state, the state's power of eminent domain; and the owner of such easement of access is, under the applicable statutes, admittedly entitled to compensation in money for such easement of access. In most instances, the value of such owner's land will be substantially lessened by the extinguishment of such easement of access. However, such lessened value will necessarily be included in the compensation, which the owner will receive for the extinguishment of that easement of access. *State, ex rel, McKay,* v. *Kauer, supra.* See *Langenau Mfg. Co.* v. *City of Cleveland,* 159 Ohio St., 525, 112 N. E. (2d), 658.

It is apparent that, wherever an easement of access to a highway by an abutting property owner is extinguished, then, to the extent of the inevitable resulting elimination of potential interference with travel on the highway, there will necessarily be an increase of the right of use of the highway by the public, and the taking of such an easement of access will therefore be a taking for the public welfare or for public use within the meaning of those words as used in Section 19 of Article I of the Constitution.

Thus, plaintiffs and other similarly situated property owners, in complaining about the director extinguishing their rights of access, are confronted with the facts that the property rights taken from them are being taken pursuant to an exercise of the state's right of eminent domain for the public use and the public welfare and in exchange for full compensation. Certainly, therefore, they cannot rely on the ordinary limitations on the exercise of the right of eminent domain. *Babin* v. *City of Ashland,* 160 Ohio St., 328, 347, 348, 116 N. E. (2d), 580; *State, ex rel, Bruestle,*

City Solr., v. *Rich, Mayor,* 159 Ohio St., 13, 110 N. E. (2d), 778; *City of Cincinnati* v. *Louisville & Nashville Rd. Co.*, 223 U. S., 390, 56 L. Ed., 481, 32 S. Ct., 267. Also, under the very words of Section 19 of Article I of our state Constitution, "private property," such as their rights of access, "shall ever be held * * * subservient to the public welfare." In effect, an owner of property holds title to that property subject to a perpetual optional right of his government to acquire that property for public use on the payment of full compensation in money therefor.

The only other complaint, that plaintiffs can have about the condemnation of their rights of access to Route 40, is a complaint that the director did not also take such rights of access from other abutting property owners. If that complaint is well founded, it might possibly justify other legal proceedings to require the director to so act. However, the mere fact, if it is a fact, that the director has failed to perform some of his duties, is no reason for enjoining him from performing other duties that he is undertaking to perform.

These plaintiffs are not in the position of parties whose property rights have been interfered with merely by an exercise of the police power or of the power of taxation. Such parties would have received no compensation for the loss resulting from such interference with their property rights, and therefore they might have a valid complaint because such rights of other similarly situated had not been similarly interfered with. The rights of these plaintiffs have been interfered with not merely by an exercise of the police power or of the power of taxation but by an exercise of the state's power of eminent domain. To the extent that their rights have been interfered with, there has been a lawful taking of their property for public use and they will be fully compensated.

The judgment of the Court of Appeals is reversed and final judgment is rendered for the Director of Highways.

Judgment reversed.

MATTHIAS, HART, ZIMMERMAN and STEWART, JJ., concur.

WEYGANDT, C. J., dissents.

BELL, J., not participating.

WEYGANDT, C. J., dissents for the cogent reasons unanimously expressed by the lower courts.

It is not even contended that this highway meets the statutory definition of a so-called limited access highway. Under the provisions of Section 1178-21, General Code (Section 5511.02, Revised Code), it must be a thoroughfare "especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway and access to which may be allowed only at highway intersections." As pertinently observed by the lower courts, the defendant does not contend that this highway was "especially designed for through traffic."

Nor can it be seen how any contention *could* be made that this is a highway especially designed for through traffic when one considers the manner in which this highway was constructed. In 1940 the first section of this four-lane highway was constructed from Columbus to West Jefferson with no mention of limited access. In 1948 and 1949, the second section was similarly constructed from the west limits of West Jefferson to the east limits of Lafayette. Then, in 1951 the second under consideration was constructed, and *at that time* the entire section from West Jefferson to the Madison-Clark county line was designated a limited access highway. To grant the highway director this authority would permit him, in his unbridled discre-

tion, to designate *any* existing highway, regardless of its age or original construction, a limited access highway and extinguish all existing rights of access thereon.

Nor does the defendant contend that this highway meets the requirement that it must be a thoroughfare "over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway and access to which may be allowed only at highway intersections." Instead, as one group of property owners, the defendant has condemned all right of access to respective properties. As to a second group, the defendant has taken access rights except that a private driveway has been reserved to each owner. As to a third group, the right of access has been extinguished from part of the respective parcels and not from other parts. As to a fourth group located along the entire south side of the highway, the access rights have been left undisturbed. Hence, the confused status of this so-called limited access highway varies all the way from unlimited access to none at all.

Not only does this discrimination fail to meet the requirement of the statutory definition but it is a clear violation of the equal protection clauses of the federal and state Constitutions.

If it is held that such authority is conferred on the defendant Director of Highways, it would seem that this legislation should be re-examined immediately by the General Assembly. Ohio, of course, is in need of highway improvement, but, even in these days of steadily increasing bureaucracy, it is to be wondered whether it is necessary therefor to employ the heavy hand of government in this discriminatory fashion.

APPENDIX C.

Opinion of the Court of Appeals.

(Rendered on the 13th day of October, 1954.)

Wiseman, P. J.:

This is an appeal on questions of law from the judgment of the Common Pleas Court of Madison county, enjoining Samuel O. Linzell, director of highways in the state of Ohio, from taking access rights of abutting property owners on U. S. Route 40.

The defendant-appellant assigns as error:

> "1. * * * in overruling defendant's demurrer to plaintiff's petition and holding that the Common Pleas Court of Madison county had jurisdiction over this cause.
>
> 2. * * * in overruling defendant's demurrer to plaintiff's petition and holding that there was a proper joinder of parties plaintiff.
>
> 3. * * * in holding that the defendant exceeded his statutory authority and his designation of U. S. Route 40 as a limited access highway was without legal effect.
>
> 4.* * * in holding that the defendant had ignored the Bill of Rights and deemed the abutting property owners equal protection of the laws as guaranteed by the State and Federal Constitution.
>
> 5.* * * in holding that the defendant's power to restrict access is not a proper exercise of the 'Police Power'."

In his first assignment of error appellant contends that the action was not properly brought in Madison county; that the defendant could be sued only in Franklin county. Section 1178-9, G. C., now Section 5501.18, R. C., provides:

> "The director shall not be suable, either as a sole defendant or jointly with other defendants, in any court outside of Franklin County in any action not otherwise specifically provided for in this act, and

except in actions brought by a railroad company under the provisions of section 8898 of the General Code, and *except by a proper owner to prevent the taking of property without due process of law, in which case suit may be brought in the county where such property attempted to be taken is situated.*" (Emphasis ours)

Under the exception, suit may be brought by property owners to prevent the taking of property without due process of law, in the county where such property is situated. It is conceded that the provisions of the above quoted section control. In the petition, plaintiffs allege that they reside in and are the owners of property located in Madison county, which is attempted to be taken without due process of law. Appellant, in his discussion of this question, presents facts which were submitted to the court at the trial. Under this assignment of error the ruling of the court in overruling the demurrer to the petition is the matter to be determined. We find other material allegations in the petition, which for the purpose of the demurrer are admitted to be true, showing "the taking of property without due process of law" which lays the venue in Madison county.

The second error assigned is that the court erred in overruling the demurrer to the petition for misjoinder of parties plaintiff. Plaintiffs instituted the action as a class suit, for their benefit and for the benefit of other property owners similarly situated. It is further alleged that the parties are very numerous, and that it would be impractical to bring them all before the court. In our opinion there was a proper joinder under Section 11257, G. C., now Section 2307.21, R. C., as interpreted in Upington v. Oviatt, 24 O. S., 232; Haggerty v. Squire, 137 O. S., 207; Wheatley v. A. I. Root Co., 147 O. S., 127.

In the third and fourth assignments of error, which will be discussed as one, the appellant contends that the court erred in holding that the appellant exceeded his statutory authority in designating Route 40 as a limited access highway, and that the plaintiffs were not afforded an equal protection of the laws as guaranteed by the state and federal Constitutions.

The matter was submitted on an agreed statement of facts. An extended statement of the facts is required. The factual situation which was stated by the trial court in a written opinion, and which is supported by the record, is as follows:

> "U. S. Route 40 is a transcontinental highway, 227 miles of which pass through Ohio. Its length in Madison County is 16 miles, passing through the incorporated village of West Jefferson, and the unincorporated villages of Lafayette and Summerford.
>
> On June 22, 1950, the Director made an entry in his Journal (Vol. 35, p. 410) declaring U. S. Route 40 between West Jefferson and the Madison-Clark County line (a distance of 13.58 miles) a limited access highway. At the time, the section between Lafayette and the Clark County line was a two-lane road, much as originally designed, and the section between West Jefferson and Lafayette was a four-lane divided road.
>
> During 1951 and 1952, the Director widened the section between Lafayette and the Clark County line by constructing a second two-lane roadway immediately to the north of the existing roadway, leaving a narrow strip of ground between them, and thus changing this section into a four-lane divided road. The section between West Jefferson and Lafayette had been changed into a four-lane roadway in the same manner in 1948 and 1949, and so had the section between Columbus and West Jefferson in 1940 and 1941. In changing all three sections provision was made for direct access to the highway by abutters and numerous paved crossings of the median strip were constructed, so located as to afford access to the farther roadway

from property abutting on the farther side of the highway. It is plain, therefore, that the highway, as widened, was designed to serve local, as well as through, traffic. The Director makes no claim that the highway was especially designed for through traffic.

In that section most recently improved, from Lafayette to the Clark County line, the Director acquired 25 parcels by easement deeds, which deeds waived any right of direct access to the highway. Four appropriation proceedings were filed to acquire the same thing. None of these 29 parcels have any access by driveway to the highway.

Two appropriation cases were filed where no restriction of access was sought.

Four other easement deeds were acquired wherein access was restricted from part of the abutter's property and not from other parts.

Five other easement deeds were acquired in which all right of access was excluded, but eight driveways have been constructed directly on to the highway from these parcels.

Five other easement deeds were acquired in which all right of access was excluded except one driveway directly on to the highway in each deed.

Four other easement deeds were acquired in which all right of access was excluded and no access provided.

Four other easement deeds were acquired in which no restriction of access was imposed.

Prior to the temporary restraining order issued herein, and in connection with the improvement between Lafayette and the Clark County line, the Director did not attempt to exclude several owners having 11,503 feet of frontage on the highway from a right of access.

It is agreed that U. S. Route 40 was not originally especially designed as a limited access highway, nor was that part between Columbus and Lafayette, when reconstructed as a four-lane highway especially designed as a limited access highway. In this connection it will be noted that the four-lane construction

between Lafayette and the Madison-Clark County line is the same design as that section between Columbus and Lafayette."

The authority of the director of highways, and the procedure to be followed, is found in Sections 1178-20 and 1178-21, G. C., now Sections 5511.01 and 5511.02, R. C.

The pertinent part of Section 1178-20, G. C., provides:

"In addition to the state highways heretofore established under authority of law, the director shall have authority to establish and designate additional state highways or *change existing state highways* after notice and hearings as hereinafter provided.

Before establishing additional highways as part of the state highway system, or *making any changes in existing highways* comprising the state highway system, the director shall give notice by publication in one newspaper of general circulation in each of the counties in which the proposed highway to be established is located or in which it is proposed to make such changes, once each week for two successive weeks. Such notice shall state the time and place of hearing, which hearing shall be held in the county, or one of the counties, in which said proposed highway or some part thereof is situated, or in which it is proposed to make such changes, and which hearings shall be open to the public and which notice shall further state the route of the proposed highway or the change proposed to be made in an existing highway of the state highway system. The director or a deputy designated by him shall attend such hearing and hear any proof offered on such matter. Any changes made in existing highways by the director or any additional highways established by him following such hearing, shall be certified to the commissioners of the counties interested therein, and a report of such change or addition filed in the office of the director, and the report of the director making such change or establishing such highway shall be placed on file in the office of the department." (Emphasis ours)

Section 1178-21, G. C., in part provides:

"The director of highways shall be authorized to lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon 'limited access highways' or 'freeways' within this state *in the manner or manners in which said director may now or hereafter lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon highways within the state.* The director also shall have any and all other additional authority and power relative to such 'limited access highways' or 'freeways' as he now or hereafter may possess relative to highways including the authority and power to acquire by gift, purchase, condemnation or otherwise land required for right-of-way.

Where an existing highway in whole or part has been designated as, or included within, a 'limited access highway' or 'freeway' existing easements of access may be extinguished by purchase, gift, agreement, or by condemnation.

As an adjunct of any 'limited access highway' or 'freeway' the director is authorized to lay out and construct highways and drives, to be designated as service highways, to provide access from areas adjacent to a limited access highway or freeway.

A 'limited access highway' or 'freeway' is a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director." (Emphasis ours)

We have been furnished a copy of the well-reasoned, written opinion of Judge Bell, and are in accord with his findings and legal conclusions. We quote at length from his opinion, which we adopt as our own, as follows:

"The court has concluded, after a careful study of the statutes, that if they may be construed to authorize the designation of a state highway, in whole or in part, as a limited access highway, they must be

construed to do so only if the highway or part so designated is '*especially designed* for through traffic.' The Court believes that any other construction would nullify the intent of the Legislature.

It certainly would be inconsistent with the legislative intent to permit the Director to designate the 13.58 mile section of U. S. 40 involved in this case as a limited access highway when the record shows that it was designed to serve local, as well as any other kind of traffic. The Director does not even contend that it was especially designed for through traffic. His position is that 'the method of construction and design is left to the discretion of the Director.'

But that is not what the Legislature said. It said that a limited access highway is one 'especially designed for through traffic.' True, the Legislature did not tell the Director just how to design and construct a limited access highway but it did lay down the general rule that it must be *especially designed* for through traffic and pointed out that it is the kind of road to which access may be had only at designated highway intersections.

Here, the part of the 13.58 mile section between West Jefferson and Lafayette was rebuilt in 1948 and 1949 as a four-lane highway and designed to serve all comers. All abutting property owners who wanted them were allowed to have private entrances to the highway from their respective properties, and paved crossings of the median strip were constructed for their convenience. When the entire section was declared to be a limited access highway in 1950, the part between Lafayette and Clark County line was still a two-lane roadway of essentially the same design as it was when originally established. It certainly was not of any special design. It was widened, of course, in 1951 and 1952 but, as widened, its design was no different than the section widened in 1948 and 1949 and the section between Columbus and West Jefferson which was widened in 1940 and 1941. In other words, all three sections were designed to serve abutters and all other users, and there is no evidence in the record to the contrary. It is the opinion of the Court, there-

fore, that the Director exceeded his statutory authority and his designation of the road in question as a limited access highway was without legal effect.

There is another phase of this question that the Court feels required to discuss and that involves the according to abutters along this highway of equal protection of the laws. The equal protection clause of the state and federal constitutions require that all persons similarly situated be accorded equal treatment. It is the opinion of the Court that the Director has ignored the Bill of Rights in dealing with the owners of property abutting on the section of road in question.

The statutes provide that where an existing highway has been designated as a limited access highway, 'existing easements of access may be extinguished by purchase, gift, agreement or condemnation.' The Director construes this clause to give him authority (1) to extinguish existing easements of access or to refrain from doing so, as he chooses; (2) to extinguish some easements and not others; and (3) to extinguish from all of a parcel of property except at one point or more.

It is the opinion of the Court that if the statutes may be construed as the Director contends the statutes are repugnant to the equal protection clauses of the state and federal constitutions.

The record shows that owners of property abutting on the north side of U. S. Route 40 between Lafayette and the Madison-Clark County line have been treated unequally in the following respects: (1) from some the Director has acquired, or is presently seeking to condemn, all rights of access from their respective parcels of property; (2) from others the Director has acquired access rights except that a private drive or drives from each parcel has been reserved to each property owner; (3) from still others the right of access has been extinguished from only a part of their respective parcels of property and not from other parts. For some of these abutters, whose access rights have been extinguished, the Director has provided private driveways from their respective parcels of property directly to the highway, but other abutters

hae been denied the same treatment. Owners of property abutting on the south side of the road between Lafayette and the Clark County line and on both sides of the road between West Jefferson and Lafayette still retain their access rights, and their driveways remain undisturbed.

There is no evidence in the record of any basis for this discrimination, nor is there any authority in the statutes for it. If the Director has authority to treat these abutters in this discriminatory fashion, it must be implied from the language of the statutes, and the Court can find nothing in the statutes from which such an implication can arise.

The Constitution, of course, does not prohibit classification, but classification must have some reasonable basis, and here there is no reason for discriminating between abutters on one side of the road and those on the other, or between abutters on the road from Lafayette, to the Clark County line and abutters on the section between West Jefferson and Lafayette. Nor is there any basis for distinguishing between the owners of adjoining properties so as to take the access rights of one and to allow the other to retain his. The Court is of the opinion it is an arbitrary discrimination between members of the same class which is prohibited by the Bill of Rights."

The fifth assignment of error raises the question as to whether the director's power to restrict access is not a proper exercise of the "Police power". We resolve this issue against the appellant on the ground that the authority which the director exercises arises under Section 19, Article I, of the Ohio Constitution, and applicable statutes and not through the exercise of the "Police power". Pontiac Improvement Co. v. Board of Commissioners, 104 O. S., 447, 464.

We find no assignment of error well made. Finding no error in the record prejudicial to the rights of the appellant, the judgment is affirmed.

Miller and Hornbeck, J. J., concur.

APPENDIX D.

Decision of the Court of Common Pleas.

(Rendered September 3, 1953.)

Bell, J.:

This is an action for an injunction filed by the plaintiffs on their own behalf and for all others similarly situated, seeking to enjoin the defendant from taking or attempting to take "limited access easements" along U. S. Route 40, known as the National Highway, in Madison county. Plaintiffs are owners of land abutting on said highway.

The matter was submitted on an agreed statement of facts and on the very able and complete briefs of counsel, including an Amici Curiae brief.

U. S. Route 40 is a transcontinental highway, 227 miles of which pass through Ohio. Its length in Madison county is 16 miles, passing through the incorporated village of West Jefferson, and the unincorporated villages of Lafayette and Summerford.

On June 22, 1950, the director made an entry in his journal (Vol. 35, p. 410) declaring U. S. Route 40 between West Jefferson and the Madison-Clark county line (a distance of 13.58 miles) a limited access highway. At the time, the section between Lafayette and the Clark county line was a two-lane road, much as originally designed, and the section between West Jefferson and Lafayette was a four-lane divided road.

During 1951 and 1952, the director widened the section between Lafayette and the Clark county line by constructing a second two-lane roadway immediately to the north of the existing roadway, leaving a narrow strip of ground between them, and thus changing this section into a four-lane divided road. The section between West Jefferson

and Lafayette had been changed into a four-lane roadway in the same manner in 1948 and 1949, and so had the section between Columbus and West Jefferson in 1940 and 1941. In changing all three sections provision was made for direct access to the highway by abutters and numerous paved crossings of the median strip were constructed, so located as to afford access to the farther roadway from property abutting on the farther side of the highway. It is plain, therefore, that the highway, as widened, was designed to serve local, as well as through, traffic. The director makes no claim that the highway was especially designed for through traffic.

In that section most recently improved, from Lafayette to the Clark county line, the director acquired 25 parcels by easement deeds, which deeds waived any right of direct access to the highway. Four appropriation proceedings were filed to acquire the same thing. None of these 29 parcels have any access by driveway to the highway.

Two appropriation cases were filed where no restriction of access was sought.

Four other easement deeds were acquired wherein access was restricted from part of the abutter's property and not from other parts.

Five other easement deeds were acquired in which all right of access was excluded, but eight driveways have been constructed directly on to the highway from these parcels.

Five other easement deeds were acquired in which all right of access was excluded except one driveway directly on to the highway in each deed.

Four other easement deeds were acquired in which all right of access was excluded and no access provided.

Four other easement deeds were acquired in which no restriction of access was imposed.

Prior to the temporary restraining order issued herein, and in connection with the improvement between Lafayette and the Clark county line, the director did not attempt to exclude several owners having 11,503 feet of frontage on the highway from a right of access.

It is agreed that U. S. Route 40 was not originally especialy designed as a limited access highway, nor was that part between Columbus and Lafayette, when reconstructed as a four-lane highway especially designed as a limited access highway. In this connection it will be noted that the four-lane construction between Lafayette and the Madison-Clark county line is the same design as that section between Columbus and Lafayette.

The statutes involved in this matter are Sections 1178-20 and 1178-21 of the General Code. The briefs of counsel have raised several interesting questions concerning these statutes, some of which the court does not feel required to discuss or decide. But foremost among those most pertinent to this case is the question of whether the director can designate an already established state general highway as a limited access highway by mere journal entry. The court has concluded, after a careful study of the statutes, that if they may be construed to authorize the designation of a state highway, in whole or in part, as a limited access highway, they must be construed to do so only if the highway or part so designated is *"especially designed for through traffic."* The court believes that any other construction would nullify the intent of the legislature.

It certainly would be inconsistent with the legislative intent to permit the director to designate the 13.58-mile section of U. S. 40 involved in this case as a limited access highway when the record shows that it was designed to serve local, as well as any other kind of traffic. The di-

rector does not even contend that it was especially designed for through traffic. His position is that "the method of construction and design is left to the discretion of the director."

But that is not what the legislature said. It said that a limited access highway is one "especially designed for through traffic." True, the legislature did not tell the director just how to design and construct a limited access highway but it did lay down the general rule that it must be *especially designed* for through traffic and pointed out that it is the kind of road to which access may be had only at designated highway intersections.

Here, the part of the 13.58-mile section between West Jefferson and Lafayette was rebuilt in 1948 and 1949 as a four-lane highway and designed to serve all comers. All abutting property owners who wanted then were allowed to have private entrances to the highway from their respective properties, and paved crossings of the median strip were constructed for their convenience. When the entire section was declared to be a limited access highway in 1950, the part between Lafayette and Clark county line was still a two-lane roadway of essentially the same design as it was when originally established. It certainly was not of any special design. It was widened, of course, in 1951 and 1952 but, as widened, its design was no different than the section widened in 1948 and 1949 and the section between Columbus and West Jefferson which was widened in 1940 and 1941. In other words, all three sections were designed to serve abutters and all other users, and there is no evidence in the record to the contrary. It is the opinion of the court, therefore, that the director exceeded his statutory authority and his designation of the road in question as a limited access highway was without legal effect.

There is another phase of this question that the court feels required to discuss and that involves the according to abutters along this highway of equal protection of the laws. The equal protection clause of the state and federal constitutions require that all persons similarly situated be accorded equal treatment. It is the opinion of the court that the director has ignored the Bill of Rights in dealing with the owners of property abutting on the section of road in question.

The statutes provide that where an existing highway has been designated as a limited access highway, "existing easements of access may be extinguished by purchase, gift, agreement or condemnation." The director construes this clause to give him authority (1) to extinguish existing easements of access or to refrain from doing so, as he chooses; (2) to extinguish some easements and not others; and (3) to extinguish the easement from all of a parcel of property except at one point or more.

It is the opinion of the court that if the statutes may be construed as the director contends the statutes are repugnant to the equal protection clauses of the state and federal constitutions.

The record shows that owners of property abutting on the north side of U. S. Route 40 between Lafayette and the Madison-Clark county line have been treated unequally in the following respects: (1) from some the director has acquired, or is presently seeking to condemn, all rights of access from their respective parcels of property; (2) from others the director has acquired access rights except that a private drive or drives from each parcel has been reserved to each property owner; (3) from still others the right of access has been extinguished from only a part of their respective parcels of property and not from other parts. For some of these abutters, whose access rights

have been extinguished, the director has provided private driveways from their respective parcels of property directly to the highway, but other abutters have been denied the same treatment. Owners of property abutting on the south side of the road between Lafayette and the Clark county line and on both sides of the road between West Jefferson and Lafayette still retain their access rights, and their driveways remain undisturbed.

There is no evidence in the record of any basis for this discrimination nor is there any authority in the statutes for it. If the director has authority to treat these abutters in this discriminatory fashion, it must be implied from the language of the statutes, and the court can find nothing in the statutes from which such an implication can arise.

The Constitution, of course, does not prohibit classification, but classification must have some reasonable basis, and here there is no reason for discriminating between abutters on one side of the road and those on the other, or between abutters on the road from Lafayette to the Clark county line and abutters on the section between West Jefferson and Lafayette. Nor is there any basis for distinguishing between the owners of adjoining properties so as to take the access rights of one and to allow the other to retain his. The court is of the opinion it is an arbitrary discrimination between members of the same class which is prohibited by the Bill of Rights.

The director contends that his power to restrict access as above described is a proper exercise of the "police power." With this contention the court cannot agree. The rights the director has are conferred by Section 19, Article I of the Ohio Constitution and applicable statutes and not through any general police power. See Pontiac Improvement Co. v. Board of Commissioners, 104 Ohio St., 447.

The court has no quarrel with the concept of limited access highways. There can be little doubt that some special provision must be made for the handling of the ever increasing volume of through traffic and there is no question of the power of the legislature to do so. The question, therefore, considered by the court has not been of the concept of limited access highways; but of the validity of these particular statutes as construed and applied by the highway director.

It should be recognized that they are poorly drawn statutes and leave much to implication. Nevertheless, the court believes that they can be construed so as to give full effect to the intention of the legislature without running afoul of constitutional restraints.

We are not dealing here with the laying out, establishment and construction of an entirely new limited access highway. That was the primary concern of the legislature and seems to be pretty well covered by the statutes; in that regard little is left to implication. The question here is of what more than that the legislature intended the director to do.

The court believes that it can be inferred from the language of the statutes that it was intended that an existing state road could be designated as a limited access highway if redesigned especially for through traffic. That would mean, at the very least, access to the road could be allowed only at designated highway intersections and that all private drives and entrances would have to be closed. That, in turn, would mean, at least, that all abutters would have to be compensated fully for loss of their access rights. This construction, and only this construction, would give effect to all of the language of the statutes and would meet the requirement of equal protection.

The attorney general objects, however, that it would be very costly to pay all abutters for loss of their respective easements of access. The Court agrees that it would be. We do not understand from the language of the statutes, however, that the legislature intended to provide for the conversion of ordinary state roads into limited access highways at the cost of abutting property owners. That idea is the highway director's, not the legislature's. If a system of limited access highways is to be provided it will be very costly, regardless of whether they are newly constructed where no road existed before, or constructed on existing state highway right-of-way. The problem of financing their cost is a legislative problem and it is not within the province of the director to attempt to solve it by dealing fast and loose with the property rights of abutters.

It is the opinion of the court that the plaintiffs are entitled to a permanent injunction, restraining the director from taking or attempting to take "Easements of access", so called, from the abutting property owners on U. S. Route 40 in Madison county, until such time as the director may lawfully designate the whole of the road in this county as a limited access highway and provide substantially the same indirect access to all such abutters and direct access to none of them.

Counsel for plaintiffs may prepare an entry accordingly, noting the director's exceptions, and submit the same to the attorney general and to the court for approval.

[redacted]

INDEX.

Motion to dismiss 1
Statement of the case..... 2
I. The question is an unsubstantial federal question... 2
II. The decision of the Supreme Court of Ohio rests on an adequate non-federal basis 4
Conclusion 5

Cases Cited.

Schnider, et ux., v. State, 241 Pac. 2d, 1..... 2
Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct., 528, 303 U. S., 206, 82 L. Ed., 751..... 5
State Highway Commission v. Burke, et al., 265 Pac. 2d, 783 3
State of Ohio, ex rel., v. Ferris, 53 Ohio State, 314..... 4
State, ex rel., v. Kauer, 156 Ohio State, 347, 351.....2, 3

Statute Cited.

General Code of Ohio—
Section 1178-21 .....2, 4

Constitutions.

U. S. Constitution—
Article XIV, Section 1 5
Ohio Constitution—
Article I, Section 2..... 4
Article I, Section 19..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

J. FRANK ROTHWELL AND DOROTHEA D. ROTHWELL,

Appellants.

vs.

SAMUEL O. LINZELL, DIRECTOR OF HIGHWAYS,

Appellee.

MOTION TO DISMISS.

Appellee in the above entitled case moves to dismiss on the grounds that the question presented is an unsubstantial federal question and that the decision of the Supreme Court of Ohio rests on an adequate non-federal basis.

C. WILLIAM O'NEILL,
Attorney General.
HUGH E. KIRKWOOD, JR.,
Assistant Attorney General.
State House, Columbus 15, Ohio,
Counsel for Appellee.

STATEMENT OF THE CASE.

I.

The Question is an Unsubstantial Federal Question.

Abutting property owners have a property right of access to a state highway (*State, ex rel., v. Kauer*, 156 Ohio State, 347, 351).

When an existing state highway is designated a limited access highway, the director of highways may extinguish existing easements of access by purchase, gift, agreement or by condemnation (Section 1178-21, General Code, second paragraph). The mere designation of an existing highway as a limited access highway does not deprive abutting property owner of the easement or right of access that he theretofore had. The director of highways must acquire this right of access from the abutting property owner.

All abutting property owners on Route 40 in Madison county were treated equally by the director of highways. The director first determined whether from the circumstances of public safety, all access rights should be taken, or whether certain points of access should be allowed, if any access rights of the abutting property owners were taken, the owner was compensated for the access right acquired.

The appellants, J. Frank Rothwell and Dorothea D. Rothwell, have the same access to a public highway that they had before Route 40 was relocated. The relocation of Route 40 is in the rear of their property and was established as a limited access highway where a public highway had not existed, therefore, they acquired no new rights of direct access. (*Schnider, et ux., v. State*, 241 Pac. (2d), 1:

State Highway Commission v. Burke, et al., 265 Pac. (2d), 783).

Judge Taft, writing for the majority, in this case stated (163 Ohio State at page 524):

> "However, with respect to a newly located portion of such a limited access highway, the words of the fourth paragraph of Section 1178-21, General Code, certainly operate to prevent the acquisition by an abutting property owner of any easement or right of access to the relocated portion merely by reason of the fact that his property abuts on such relocated portion."

Existing Route 40 in front of appellant's property was not designated a limited access highway. Existing Route 40 at this point was relocated. Appellant's easements of access were not affected nor did they acquire an easement of access to relocated Route 40, a limited access highway.

An easement of access to an existing highway is considered by the courts of this state to be a property right as much as the physical land (*State, ex rel., v. Kauer*, 156 Ohio State, 347). If the director of highways must deny or allow the exact number of accesses, the same being property rights, to all abutting property owners, he would, in taking physical land, also a property right, have to take the exact amount of acreage from each abutting owner so as not to violate the constitutional guarantee of equal protection of the laws. Equal protection of law does not mean every individual shall be affected exactly in the same manner. If the laws are available to all affected, then that constitutional right is not violated.

All owners of property abutting on Ohio highways have equal protection of the laws. If their property, either physical land or access rights, is required for the improvement of the highway, they will be fully compensated for their property taken.

II.

The Decision of the Supreme Court of Ohio Rests on an Adequate Non-federal Basis.

Article I, Section 2 of the Constitution of the state of Ohio guarantees the equal protection of the laws to its citizens.

It was held in the case of *State of Ohio, ex rel., v. Ferris*, 53 Ohio State, 314:

> "4. The first section of the fourteenth amendment to the Constitution of the United States, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' is not, as to the question in this case, broader than the second section of our bill of rights."

Section 1178-21, General Code of Ohio, is as follows:

> "Where an existing highway in whole or part has been designated as, or included within, a limited access highway or freeway existing easements of access may be extinguished by purchase, gift, agreement or by condemnation."

The extinguishment of an existing easement of access is a taking of a property right for public use.

Article I, Section 19 of the Constitution of O.. ,rovides:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall

be assessed by a jury, without deduction for benefits to any property of the owner."

The inclusion of the contention of an alleged violation of Section 1 of Article XIV of the United States Constitution before the Supreme Court of Ohio in this case was surplusage. The Supreme Court of Ohio had adequate authority in the Constitution of Ohio and the statute to render its decision in favor of the director of highways. The decision could have been rendered without referring to Section 1 of Article XIV of the United States Constitution.

It was stated in the case of *Southwestern Bell Telephone Co. v. State of Oklahoma*, 58 S. Ct., 528, 303 U. S., 206, 82 L. Ed., 751:

> "The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment as rendered could not have been given without deciding it."

CONCLUSION.

The question is an unsubstantial federal question. The Supreme Court of Ohio had adequate authority in the state of Ohio Constitution and statute to decide the question. The federal question raised in the state court was surplusage and not the primary question before the court. The decision of the federal question was not necessary to the determination of the cause, and was ancillary to the court's decision.

Therefore, appellee respectfully submits that appellants' case should be dismissed.

C. WILLIAM O'NEILL,
Attorney General,
HUGH E. KIRKWOOD, JR.,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Counsel for Appellee.

FILED
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No. 675.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

Appeal from the Supreme Court of the State of Ohio.

J. FRANK ROTHWELL AND DOROTHEA D. ROTHWELL,

Appellants,

vs.

SAMUEL O. LINZELL, DIRECTOR OF HIGHWAYS,

Appellee.

REPLY BRIEF FOR APPELLANTS OPPOSING MOTION TO DISMISS.

JOHN CAREN,
50 W. Broad St., Columbus 15, Ohio,
Counsel for Appellants.

WILLIAM S. EVATT,
ROBERT L. BARTON,
Of Counsel.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 675.

J. FRANK ROTHWELL AND DOROTHEA D. ROTHWELL,

Appellants,

vs.

SAMUEL O. LINZELL, DIRECTOR OF HIGHWAYS,

Appellee.

REPLY BRIEF FOR APPELLANTS OPPOSING MOTION TO DISMISS.

I.

THE FEDERAL QUESTION IS SUBSTANTIAL.

The essence of the attack on the substantiality of the federal question is that there was a reasonable basis for the discriminatory treatment of owners of property abutting on U. S. Route 40 in Madison county, particularly for the discrimination against the appellants.

The appellee's first point is (Appellee's brief, p. 2) that all the abutters were treated equally because (before taking

the access rights of any of them) "the director first determined whether from the circumstances of public safety, all access rights should be taken, or whether certain points of access should be allowed, * * *" The implication is, of course, that the discrimination was based on considerations of public safety.

The record is to the contrary. Whatever reasons the director may have had for discriminating between abutters, none was ever made known to anyone in the course of this proceeding. The power claimed was to unfettered discretion in controlling access to the highway. The fact that there was no basis for the discrimination gave rise to the equal protection question.

Speaking directly to this point, the trial court said (Jurisdictional statement, Appendix D, p. 40):

> "There is no evidence in the record of any basis for this discrimination nor is there any authority in the statutes for it."

The Court of Appeals agreed. (Appendix C, p. 34.) The Supreme Court found no factual basis for the discrimination: the majority said that the statute "apparently authorizes" it, and approved the director's actions on the unique ground that those arbitrarily discriminated against were entitled to compensation. (Appendix B, pp. 21, 22.)

The appellee's second point is that the appellants were not in the same situation as other abutting property owners because U. S. Route 40 had been relocated so as to cross the rear of the appellants' property instead of in front of it, as before. The position is that the appellants had no right of access because the relocated section (1.123 miles adjacent to the west boundary of the county) was a newly constructed "limited access highway" to which they could have no right of access because of the provisions of Section 1178-21, General Code.

The question is of the jurisdiction of the trial court; it was resolved against the director at every stage of the case and is not involved in this appeal. The record shows that the director instituted an action to condemn the appellants' right of access to U. S. Route 40, as relocated. The appellants then brought this action, as a class suit, to enjoin the director from interfering with the access rights of all abutters on the ground that the director was unauthorized to designate U. S. Route 40 as a limited access highway and, therefore, that the taking of access rights would constitute a taking of property without due process of law. The appellee demurred to the petition on the grounds (1) that no want of due process was involved in depriving the appellants of access to the road, since it was authorized by the statute, and (2) that the appellants could not assert the constitutional rights of others in a class action. The trial court overruled the demurrer on both grounds and was affirmed by the appellate court. (Jurisdictional statement, Appendix C, pp. 26, 27.) In effect, the ruling was that the appellants had the right of access to the highway as relocated, and were similarly situated with all other abutters.

In appealing to the Supreme Court, the director included the action on the demurrer in his assignments of error; but, as the majority opinion discloses, the court treated the appellants and all other abutters as having the right of access to U. S. Route 40 and as being similarly situated. Specifically, the court said (Jurisdictional statement, Appendix B, p. 22):

> "Thus, plaintiffs and other similarly situated property owners, in complaining about the director extinguishing their rights of access, are confronted with the facts that the property rights taken from them are being taken pursuant to an exercise of the state's right to eminent domain for the public use and the public

> welfare and in exchange for full compensation. Certainly, therefore, they cannot rely on the ordinary limitations on the exercise of the right of eminent domain."

In sum, this contention of the appellee as to the appellants having no right to bring this action involves a construction of the procedural law of Ohio which was resolved against the appellee and is not subject to review here. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S., 667, 70 S. Ct., 876, 94 L. Ed., 1194; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S., 185, 57 S. Ct., 325, 81 L. Ed., 593.

The decision of the Ohio court determined the equal protection question not only as to the named appellants but as to every other owner of property abutting on the 12½ miles of U. S. Route 40 in Madison county which were not relocated.

II.

BASIS OF THE DECISION.

The appellee's position is that the decision "rests on an adequate non-federal basis". (Appellee's brief, p. 4.) The precise ground is not specified but the implication is that Article I, Section 2 of the Ohio Constitution is controlling, viz.:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

A similar contention was made by the Attorney General of Ohio in *Copperweld Steel Company v. Industrial Com-*

mission of Ohio, 324 U. S., 780, 65 S. Ct., 1006, 89 L. Ed., 1363, and was rejected in these words (324 U. S., at page 785):

> "We think that the appellant disclosed, and the court below understood, that the provisions of the Fourteenth Amendment of the Federal Constitution were invoked. Not only does the Ohio Constitution embody no provisions in the words of that Article but it is doubtful that it contains any equivalent provisions."

It necessarily follows that the state constitutional provision is not an adequate base for the decision that abutters were accorded the equal protection of the laws of Ohio required by the Fourteenth Amendment.

The record in the instant case shows that the Ohio court made no attempt to avoid the controlling federal question. In the majority opinion arbitrary discrimination is first spelled out in detail (163 Ohio St., 525, 526), then approved in these words (163 Ohio St., 526):

> "Although Section 1178-21, General Code (see especially second paragraph thereof), apparently authorizes such action by the director, it is contended that, if so construed, that statute is repugnant to the equal protection clauses of the state and federal Constitutions. In the state Constitution, Section 2 of Article I provides that 'government is instituted for' the 'equal protection and benefit' or 'the people'; and, in the federal Constitution, Section 1 of Article XIV, Amendments, provides that 'no state shall * * * deny to any person * * * the equal protection of the laws.'";

and finally justified it as follows (163 Ohio St., 527):

> "Thus, plaintiffs and other similarly situated property owners, in complaining about the director extinguishing their rights of access, are confronted with the facts that the property rights taken from them are being taken pursuant to an exercise of the state's right of eminent domain for the public use and the public

> welfare and in exchange for full compensation. Certainly, therefore, they cannot rely on the ordinary limitations on the exercise of the right of eminent domain."

There is nothing ambiguous or obscure about this decision that the statute, as applied, is valid under the Fourteenth Amendment. Certainly, compensation for arbitrary discrimination does not satisfy the Fourteenth Amendment; and the fact that it satisfies Article I, Section 2 of the Ohio Constitution is not adequate to support the judgment. *Abie State Bank v. Bryan*, 282 U. S., 765, 51 S. Ct., 252, 75 L. Ed., 690; *State Tax Commission v. VanCott*, 306 U. S., 511, 59 S. Ct., 605, 83 L. Ed., 950.

It is respectfully submitted that the motion should be denied.

JOHN CAREN,
Attorney for Appellants.